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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,)	No. CR 08-0399 PJH
Plaintiff,)	DEFENDANT'S MOTION IN LIMINE TO
v.)	EXCLUDE OTHER ACTS AND
JAIME SALCEDO MENDOZA,)	IMPEACHMENT EVIDENCE
Defendant.)	Pretrial Conference: August 27, 2008

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17 **INTRODUCTION**

18 Defendant Jaime Salcedo Mendoza respectfully moves the Court for an order excluding
19 all "other acts" evidence from trial. Such evidence is generally disfavored. Moreover, the
20 government has not articulated a theory of relevance under Federal Rule of Evidence 404(b) for
21 any such evidence it might seek to introduce, or demonstrated that the probative value of the
22 evidence is not substantially outweighed by the danger of unfair prejudice or confusion of the
23 issues under Rule 403. Accordingly, the Court should not admit any other-acts evidence at trial.

24 Mr. Salcedo Mendoza also moves the Court for an order excluding certain proffered
25 impeachment evidence from trial on similar grounds.

ARGUMENT

I. Other-Acts Evidence Is Generally Disfavored

3 Federal Rule of Evidence 404(b) states that “[e]vidence of other crimes, wrongs, or acts is
4 not admissible to prove the character of a person in order to show action in conformity
5 therewith.” Fed. R. Evid. 404(b). The rule goes on to state that such evidence “may, however,
6 be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,
7 knowledge, identity, or absence of mistake or accident, provided that upon request by the
8 accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or
9 during trial if the court excuses pretrial notice on good cause shown, of the general nature of any
10 such evidence it intends to introduce at trial.” *Id.*

The Ninth Circuit has repeatedly noted that the limitations of Rule 404(b) are “designed to avoid a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced the defendant is a bad man deserving of punishment.” *United States v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991) (citations and internal quotation marks omitted); see also *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (noting that the reluctance to sanction the use of other-acts evidence “stems from the underlying premise of our criminal system, that the defendant must be tried for what he did, not for who he is”).

19 Due to the danger that the jury will be swayed to convict a defendant based upon
20 uncharged conduct, the Ninth Circuit has mandated that “the use of such evidence must be
21 narrowly circumscribes and limited.” *See, e.g., United States v. Bailleux*, 685 F.2d 1105, 1109
22 (9th Cir. 1982); *see also Mayans*, 17 F.3d at 1181 (“[E]xtrinsic acts evidence is not looked upon
23 with favor.”). Other-acts evidence is thus generally disfavored.

II. The Government Bears the Burden of Identifying a Theory of Admissibility for Other-Acts Evidence and Demonstrating Admissibility Under Rules 403 and 404(b)

As noted above, Rule 404(b) enumerates purposes for which other acts evidence may be

1 admitted. Prior to the admission of any other-acts evidence, the government must carry its
 2 burden of showing how the proffered other-acts evidence “is relevant to one or more issues in the
 3 case; specifically, it must articulate precisely the evidential hypothesis by which a fact of
 4 consequence may be inferred from the other acts evidence.” *United States v. Mehrmanesh*, 689
 5 F.2d 822, 830 (9th Cir. 1982) (citations omitted); *see also United States v. Brooke*, 4 F.3d 1480,
 6 1483 (9th Cir. 1993) (quoting *Mehrmanesh*); *United States v. Arambula-Ruiz*, 987 F.2d 599, 602-
 7 03 (9th Cir. 1993) (same); and *United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985)
 8 (same). The government must then demonstrate that the proffered evidence meets the
 9 requirements for admission under Rules 404(b) and 403. *See, e.g., Mayans*, 17 F.3d at 1181-83.

10 The Court must “make a focused determination of relevance mandated by” the rules of
 11 evidence before any other-acts evidence can be admitted. *Id.* at 1183. The Court cannot make
 12 the requisite determination unless the government articulates a theory for admission and carries
 13 its burden of proof.

14 **III. The Government Has Not Met its Burden of Identifying a Theory of Admissibility
 15 for Other-Acts Evidence and Demonstrating Admissibility Under Rules 403 and
 404(b)**

16 The government has provided only vague notice regarding potential 404(b) evidence. On
 17 July 24, 2008, defense counsel received a letter enclosing copies of court documents and
 18 pleadings related to Mr. Salcedo Mendoza’s May 14, 2003 conviction for reentry after
 19 deportation. The letter stated: “The government also hereby gives notice that it may seek to
 20 introduce the other crimes, wrongs or acts committed by defendant which are referenced in the
 21 enclosed documents pursuant to Rules 404(b), 608 and/or 609 of the Federal Rules of Evidence.”
 22 *See* AUSA Helou Letter of July 24, 2008 (hereinafter “Helou Letter”), attached to Declaration of
 23 Ronald Tyler Authenticating Documents (hereinafter “Tyler Auth. Dec”) as Exhibit A. The bare
 24 recital of Evidence sections was not illuminated by any evidentiary hypotheses.

25 The documents accompanying the letter included the following:

- 1) A copy of pretrial minutes for the related February 21, 2003 change of plea proceedings
- 2) A copy of the application for permission to change plea on that same date.
- 3) A copy of the plea agreement filed on that same date.
- 4) A copy of the defendant's sentencing memorandum from May 6, 2003.
- 5) A copy of the government's opposition to the defendant's memorandum, filed on May 9, 2003.

7 It is unclear how the government intends to use these materials. At several points within
8 the documents, patently prejudicial character evidence abounds. In the defendant's sentence
9 memorandum, references are made to: Mr. Salcedo Mendoza's addiction to drugs and alcohol;
10 his drug-related convictions of the 1990's; a more recent drug-related felony conviction; and two
11 misdemeanor convictions for battery and resisting arrest. *See* Excerpts of Defendant's May 6,
12 2003 Sentencing Memorandum, attached to Tyler Auth. Dec. as Exhibit B.

13 In the government's opposition to the defendant's memorandum, additional prejudicial
14 character evidence appears: references to Mr. Salcedo Mendoza's criminal history points,
15 criminal history category and prior criminal convictions. *See* Excerpts of Government's May 9,
16 2003 Opposition, attached to Tyler Auth. Dec. as Exhibit C.

17 Neither Mr. Salcedo Mendoza’s addiction nor the referenced prior convictions are
18 admissible at trial. The addiction is not admissible because it is character evidence with no
19 evidentiary value.

20 The prior convictions are not admissible because their only permissible purpose at trial
21 would be to establish that Mr. Salcedo Mendoza was deported after suffering a felony conviction.
22 See *Garcia-Aguilar vs. U.S. District Court*, __ F.3d __, 2008 WL 3009680 (9th Cir. 2008) (In
23 Section 1326 prosecution, sequence of previous conviction and removal must be alleged and
24 proven). For that purpose, Mr. Salcedo Mendoza will stipulate to the existence and date of the
25 most relevant prior felony. Specifically, he will stipulate that he suffered a felony conviction

1 prior to February 12, 1999—the date on which the government alleges he was first deported.

2 Consequently, given that the government has articulated no theory of admissibility under
3 Rule 404(b) and given that the only legitimate basis is rendered unnecessary by the defendant's
4 stipulation, the Court should exclude all other-acts evidence from trial.

5 **IV. The Government Has Also Failed to Identify a Theory of Admissibility Under Rules
6 608 and 609.**

7 The government has indicated that it also may seek to introduce materials attached to the
8 Helou Letter for purposes of impeachment under Federal Rules of Evidence 608 or 609. *See*
9 Helou Letter. It is difficult to fathom the evidentiary hypothesis that would support such
admission and the government's bald assertions are unhelpful.

10 **A. Federal Rule of Evidence 608**

11 Federal Rule of Evidence 608 permits attacks on the credibility of a witness based on
12 opinion or character evidence—not applicable to the material proffered by the government—or
13 based on specific instances of conduct, which appears to facially fit the government's evidence.
14 Fed. R. Evid. 608(b). The Rule provides:

15 Specific instances of the conduct of a witness, for the purpose of attacking or supporting
16 the witness' character for truthfulness, other than conviction of a crime as provided in
17 Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion
18 of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-
19 examination of the witness

20 Fed. R. Evid. 608(b).

21 If the government seeks admission under rule 608, several obstacles arise. First, none of
22 the materials can be introduced as substantive evidence. *Id.* Second, the only possibly
23 admissible evidence under that rule would be the evidence of Mr. Salcedo's addiction (since the
24 other evidence, of convictions, falls under Rule 609). Furthermore, if the government intended to
25 inquire into the addiction on cross-examination, it is stymied by the lack of the evidence's
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1 probative value. There is no logical connection between someone's history of addiction and that
2 person's character for truthfulness at the time of testimony. In any event, there is no indication
3 that Mr. Salcedo Mendoza will testify and be subject to impeachment.

4 **B. Federal Rule of Evidence 609**

5 The inadmissibility of the evidence of Mr. Salcedo Mendoza's various convictions, is
6 established in the separately filed, "Defendant's Motion In Limine to Exclude Prior
7 Convictions."

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9 **CONCLUSION**

10 For the reasons stated, the Court should grant Mr. Salcedo Mendoza's motion and
11 exclude all other-acts evidence under Rules 403, 404(b), 608 and 609.

12 Dated: August 13, 2008

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14 Respectfully submitted,

15 BARRY J. PORTMAN
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17 /S/
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